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No. 94-197

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, INDIVIDUALLY AND
IN HER OFFICIAL CAPACITY AS DIRECTOR,
CALIFORNIA DEPARTMENT OF SOCIAL SERVICES;
CALIFORNIA DEPARTMENT OF SOCIAL SERVICES;
AND RUSSELL S. GOULD, DIRECTOR,
CALIFORNIA DEPARTMENT OF FINANCE,

Petitioners,

vs.

DESHAWN GREEN, DEBBY VENTURELLA, AND
DIANA P. BERTOLTI, ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court
Of Appeals, Ninth Circuit

REPLY TO OPPOSITION TO PETITION

DANIEL E. LUNGREN
Attorney General of the
State of California

CHARLTON G. HOLLAND, III
Assistant Attorney
General

DENNIS ECKHART
Supervising Deputy
Attorney General

ANDREA LYNN HOCH
Deputy Attorney General
**Counsel of Record*

*THEODORE GARELIS
Deputy Attorney General
State Bar No. 95193
P.O. Box 944255
Sacramento, California
94244-2550
Telephone: (916) 445-0767
Counsel for Petitioners

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The petitioners, Eloise Anderson, Director, California
Department of Social Services, California Department of
Social Services and Russell S. Gould, Director, California

Department of Finance¹, ("California") reply to the opposition to the Petition for a Writ of Certiorari as follows:

Contrary to plaintiffs' arguments, this action is not moot, and this Court has yet to address the questions presented by the Petition. The question of the constitutionality of the residency requirement mandated by California Welfare and Institutions Code section 11450.03 ("the Statute") persists despite the invalidation of a federal waiver by the United States Court of Appeals in another case. Also, this Court has yet to address the constitutionality of a residency requirement for public benefits which does not penalize the right to travel. The Statute does not provide for an outright denial of public benefits, does not create permanent distinctions based upon residency, and provides each new resident beneficiary the same amount of Aid to Families with Dependent Children ("AFDC") benefits which were constitutionally permissible in the beneficiary's state of prior residence.

I

THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY AND IS NOT MOOT

Plaintiffs' argument that this case is not ripe and is moot, is disingenuous and is based upon a faulty understanding of the Ninth Circuit's opinion in *Beno v. Shalala*,

¹ Mr. Gould was appointed as the Director of the California Department of Finance on August 1, 1993, and as such, is the successor in interest to Thomas Hayes, who was named in the original pleadings. Mr. Gould is automatically substituted as a party in place of Mr. Hayes pursuant to the provisions of Rule 25(d) of the Federal Rules of Civil Procedure.

___ F.3d ___ (No. 93-16411, 1994 U.S. App. LEXIS 17043, 9th Cir. July 13, 1994).

Beno is a challenge by AFDC recipients to a five-year experimental project modifying public assistance benefits provided by California under the AFDC program. This demonstration project includes the Statute as one of its components. The United States Secretary of Health and Human Services ("the Secretary") approved the Demonstration Project in 1992. In *Beno*, the Ninth Circuit reversed the denial of a motion for preliminary injunction against the operation of certain elements of the Demonstration Project on the ground that the Secretary had not considered factors mandated by federal law and had not considered objections submitted to her before granting California a waiver of the Medicaid Maintenance of Effort requirement. 42 U.S.C. § 1396a(c)(1).² The Ninth Circuit invalidated the federal waiver and remanded the case to the District Court with instructions to remand to the Secretary for additional consideration of the objections previously submitted to her.

The invalidation of the Maintenance of Effort waiver is significant since, under the Statute, the waiver is required for the Statute to be implemented. However, the invalidation of the waiver does *not* render this case moot.

² The Maintenance of Effort requirement relates to approval for California's Medicaid program, and reads in pertinent part:

"[T]he Secretary shall not approve any State plan for medical assistance if . . .

(1) the State has in effect [AFDC] payment levels that are less than the payment levels in effect under such plan on May 1, 1988."

The Ninth Circuit opinion is not a final judgment on the merits as only the order denying a preliminary injunction was presented to the Ninth Circuit for review. Furthermore, the Ninth Circuit specifically instructed the District Court to remand California's waiver request to the Secretary for further consideration.³

It has long been held by this Court that a case does not become moot by reason of the expiration of "short term orders, capable of repetition, yet evading review" *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). A controversy does not become moot when the questioned conduct is likely to recur or the "underlying question persists and is agitated by the continuing activities and program of petitioners. . . ." *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968).

In *Carroll*, this Court granted certiorari to review a state court order restraining petitioners for ten (10) days from holding rallies which would tend to disturb and endanger local residents. Petitioners in *Carroll* asserted that their case was not moot because the underlying question as to the power of local government to restrict petitioners' activities and programs persisted, despite the expiration of the ten-day order. Similarly, here the question of the constitutionality of the Statute persists, even though an underlying waiver has currently been invalidated on procedural grounds only. California expects that its renewed waiver request will be approved in a manner

³ On August 25, 1994, California submitted a renewed waiver request to the Secretary.

which will withstand any future procedural challenge. At that point, the constitutionality of the Statute will still need to be addressed.

Plaintiffs' argument is disingenuous because, if this case is moot for purposes of this petition for writ of certiorari, it then logically follows that petitioners' trial court action should be dismissed and the preliminary injunction dissolved. Presumably, petitioners would not wish to see such a logical and consistent result to their argument.

This case is not moot, and this Court should seize this opportunity to provide guidance to the states and the lower courts on the important issue of constitutional law presented by this case.

II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED AS THIS COURT HAS YET TO ADDRESS THE ISSUES PRESENTED BY THIS CASE

Plaintiffs fail to recognize the vital importance of the factual differences between the Statute and other residency requirements previously considered by this Court. The critical distinction between the Statute and other durational residency requirements for public benefits is that the Statute does not penalize the right to travel. The Statute does not provide for an outright denial of benefits such as that condemned in *Shapiro v. Thompson*, 394 U.S. 618 (1969) or in *Memorial Hospital v. Maricopa County*, 415 U.S. 25 (1974). Furthermore, the Statute does not create permanent distinctions based on the length of state residency as in *Zobel v. Williams*, 457 U.S. 55 (1982) (size of

payments from oil revenues dependent upon years of residence in Alaska); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) and *Attorney General of New York v. Soto Lopez*, 476 U.S. 898 (1986) (preferences for veterans based on length of state residency). The Statute explicitly provides that persons subject to the Statute receive *at all times* a constitutionally permissible amount of AFDC benefits: either what they received, or would have received, in their prior state of residence, or (after one year of residency) the full amount of the California grant.

Thus, it cannot be said that the Statute penalizes the right to travel as persons subject to the Statute are not deprived of the basic necessities of life. As noted above, the Statute does not determine eligibility for AFDC benefits; to the contrary, it provides for a constitutionally permissible amount of AFDC benefits. The Statute has no impact on the receipt of Medicaid benefits and, in fact, increases the amount of Food Stamps issued to persons subject to the Statute. (Pet. at 10).

Because this Court has not previously ruled on the question of whether a statute which does not penalize the right to travel may establish a system for the distribution of public benefits based upon, for a limited period of time, length of residency, this Court should grant the petition for writ of certiorari. This is a very important question of constitutional law. The Secretary, the various states and the lower courts all require guidance on this question. As noted on pages 4-5 of the amicus brief in support of the petition submitted on behalf of the Washington Legal Foundation, " . . . numerous state legislatures - including those of Illinois, Iowa, Minnesota, New

York, Wisconsin, and Wyoming - have recently established such requirements." As noted in the opposition to this petition for writ of certiorari, other states have also petitioned for writ of certiorari on this issue.

CONCLUSION

This Court should grant the petition for writ of certiorari. This action is not moot. It presents important questions of federal law which have yet to be decided by this Court. By granting the petition, this Court can provide essential guidance on a recurring and important issue.

Dated: September 21, 1994

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California

CHARLTON G. HOLLAND, III
Assistant Attorney General

DENNIS ECKHART,
Supervising Deputy Attorney
General

ANDREA LYNN HOCH
Deputy Attorney General

THEODORE GARELIS
Deputy Attorney General

Attorneys for Petitioners